No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1942

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION, PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO SUBSTITUTE

The Solicitor General with the consent of the petitioner moves to substitute the present Administrator of the Wage and Hour Division, L. Metcalfe Walling, who took office on March 6, 1942, in place and instead of Philip B. Fleming, who resigned his office on December 9, 1941.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of Labor.

AUGUST 1942.

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MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE

The facts relating to the succession in office of the present Administrator are somewhat complicated and it is perhaps well to set these out in some detail together with a summary of the applicable principles of law.

Philip B. Fleming resigned as Administrator of the Wage and Hour Division on December 9, 1941. Baird Snyder, Deputy Administrator, served as Acting Administrator until December 30, 1941. Thomas W. Holland was appointed Deputy Administrator on December 31, 1941, and served as Acting Administrator until January 3, 1942. On

that date he received a recess appointment as Administrator from the President under the Act of July 11, 1940 (5 U. S. C. sec. 56), which permits compensation to be paid presidential nominees even though the vacancy existed during a session of the Senate if it arose within 30 days of adjournment and if a nomination is submitted to the Senate within 40 days after the commencement of the next session. On February 15, 1942, Mr. Holland's compensation ceased. On February 26, 1942, the President nominated L. Metcalfe Walling as Administrator. The Senate confirmed the nomination and he took office on March 6, 1942.

The present motion to substitute is proper on any of several grounds.

1. The Act of February 13, 1925 (sec. 11, 43 Stat. 941, 28 U. S. C. 780, replacing the Act of Feb. 8, 1899, 30 Stat. 822) permits substitution of an official party within six months after the predecessor left office. The 1899 Act was enacted, pursuant to a suggestion of this Court, in *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, 605, to prevent abatement of actions brought against federal officials. *Allen* v. *Regents,* 304 U. S. 439, 444–445. It is permissive in nature, and is designed only to eliminate the inconvenience caused by the rule abating actions against predecessor officials. *Es parte La Prade,* 289 U. S. 444, 458–459; *Fix* v. *Philadelphia Barge Co.,* 290 U. S. 530, 533; *Allen* v. *Regents,* 304 U. S. 439, 444–445. It does not, then, impose an affirma-

tive limitation upon the power of a successor official to maintain the suit of his predecessor but only removes a common law disability.

That disability is inapplicable to a case such as this. While the statute speaks broadly of a suit "brought by or against an officer of the United States," the actions which in its absence would abate are those brought against the official as a person; it is because the suits are personal in nature "that a successor in office is not privy to his predecessor in respect of the alleged wrongful conduct." *Allen* v. *Regents, supra,* 444.[2] Here the action is a suit by the Administrator, not against him. It is based on no alleged misconduct of the official, and seeks no relief on his behalf (see R. 4–9). It is, instead, an action, authorized by statute, to obtain compliance with the Fair Labor Standards Act. As such it is official, not personal, and the successor Administrator is privy to his predecessor. In consequence the action does not abate, and the successor may be

[2] In every instance which we have found, the action abated by decision of this Court was one against the predecessor official, ordinarily in mandamus or for injunction. See e. g., the *Secretary* v. *McGarrahan*, 9 Wall. 298; *United States* v. *Boutwell*, 17 Wall. 604; *United States* v. *Chandler*, 122 U. S. 643; *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28; *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600; *LeCrone* v. *McAdoo*, 253 U. S. 217; *Irwin* v. *Wright*, 258 U. S. 219; *Ex parte La Prade*, 289 U. S. 444. *United States ex rel Claussen* v. *Curran*, 276 U. S. 590, was an action in habeas corpus but even there the theory of the action is that the respondent wrongfully holds the person of the petitioner.

substituted at any time. In *Thompson* v. *United States*, 103 U. S. 480, 483, because "there is a continuing duty irrespective of the incumbent," the court in the absence of statutory authorization allowed substitution of a successor township clerk even in a mandamus action against his predecessor. The result applies *a fortiori* to a suit brought by the official. Since, then, the action would not abate at common law, it is unnecessary that the substitution be made within the letter of the remedial statute to be valid.

2. The Act of February 13, 1925, permits substitution for the predecessor "within six months after his death or separation from office." This would suggest that a statutory substitution in this case would be authorized up to June 9, 1942. But Rule 25 (d) of the Federal Rules of Civil Procedure authorizes the action to be continued if there be substitution "within 6 months after the successor takes office." If this case were now pending in the district court, the substitution could doubtless be made at any time prior to September 6, 1942, six months from the date the present Administrator took office.[8] The Federal Rules

[8] There were two Acting Administrators and one recess appointee, who was compensated for 42 days and uncompensated for 21 days in the period intervening between December 9, 1941, and March 6, 1942. Rule 25 (d) would hardly be expected to turn upon the assumption of office by an Acting Administrator or by a recess appointee who could be compensated only for 40 days. And, as to the latter, it is doubtful that a proceeding such as this is an appropriate oc-

of Civil Procedure are inapplicable to proceedings in this Court, it is true, but the evident desirability of a harmonizing construction of the substitution procedure is such that doubts should be resolved in favor of the substitution.

3. By letter dated August 14, 1942, to the Clerk of this Court, counsel for the employer herein consented to and indeed urged the substitution of the successor administrator. Although the Court in the *Butterworth* case, 169 U. S. at 605 held that consent was ineffective, that decision, as we have shown, is inapplicable to a case such as this, where the official seeks merely to enforce a statutory duty wholly unrelated to his own conduct or tenure of office. In such a case, if otherwise doubtful, the consent of the parties should be sufficient to cure any procedural infirmity.[4]

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casion to resolve an ancient controversy between the executive and the legislature over the precise status of recess appointees to a position in which the vacancy arose during a session of the Senate. See 1 Op. A. G. 631; 12 Op. A. G. 449; 16 Op. A. G. 522; 19 Op. A. G. 261; Act of Feb. 9, 1863, 12 Stat. 646; R. S., sec. 1761. If the Act of July 11, 1940, be considered a recognition of the executive power, the effect of the failure to send a nomination to the Senate within 40 days after its convening leaves the question at large.

[4] The judgment of the circuit court of appeals was entered on March 20, 1942, and the mandate issued on April 13, 1942 (R. 452–453), well within the six months' period by any computation. The injunction is, then, in effect against the petitioner and the changes in office have no bearing on the judgment and decree from which petitioner seeks relief. The issue, then, is not one of jurisdiction or of mootness but simply one of procedural nicety.

Moreover, the enactment of the substitution statute may well give a greater scope to the parties' consent than was possible in the *Butterworth* case. It is a remedial statute and is to be liberally construed. *Allen* v. *Regents, supra,* 445. In *Thomas B. Bishop Co.* v. *Santa Barbara County,* 96 F. (2d) 198, 203 (C. C. A. 9), the court allowed substitution on consent of the parties two years after the successor took office. And in *Federal Land Bank* v. *Bismarck Lumber Co.,* 313 U. S. 556, 314 U. S. 95, 98, this Court seems to have given some weight to the consent of the parties.

On any of these grounds, we respectfully submit that the motion for substitution should be granted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of Labor.

AUGUST 1942.

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